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No. 1169.

In the

Supreme Court of the United States

OCTOBER TERM, 1965

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO, Rockford, Illinois, Winnebago County, et al,

Respondents-Appellees Below.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your Petitioners, Suburban Tile Center, Inc., and United Construction And Trades Union, Local #102, respectfully pray that this Honorable Supreme Court grant a rehearing of its Order entered in this cause on May 31st, 1966, denying their Petition for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The instant basis relied upon in urging Your Honors to grant rehearing is that your Petitioners had available other substantial grounds not previously presented in their Petition for the issuance of the Writ of Certiorari.

In a determination of first impression, the Circuit Court of Appeals for the Seventh Circuit, reported at 354 F2d 1, (1965), held that a Winnebago County, Illinois, area-wide group boycott conspiracy, effected in combination between the major employers, engaged therein in the construction industry and allied fields, and the Rockford Area Trades Council, AFL-CIO, was legalized by the enactment of the "Construction Site Proviso", Title 29 U.S.C.A., Section 158(e), (Pet. for Writ of Cert., 3, 4).

The Court of Appeals, at 354 F2d 1, 2, 3, found that the group boycott pact between the "Defendant Building Contracting Association of Rockford, Inc., which represents a majority of contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (multi-employers) . . . with the Defendant Rockford Building and Construction Trades Council of Winnebago County, (which consists of representatives of about twenty local unions) . . . [imposed against] anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union, (affiliated with the Trades Council), which commonly has jurisdiction over the class of work involved", to have been approved by Congress "for the construction industry", and hence immunized from the purview of the Anti-Trust laws. [insert added]

Heretofore your Petitioners contended that the combine's restrictive pact, constituted an unreasonable restraint upon trade, within the scope of the anti-trust laws, and further, that Congress never intended the "Construc-

tion Site Proviso" to be the source of justification for a group boycott that assumed far-reaching economic magnitude, resulting in a major encroachment upon our free enterprise system.

Most assuredly, the decision of the Circuit Court of Appeals, and its interpretation of the "Construction Site Proviso", would as readily legalize a group boycott between the national counter-parts of the multi-employers and the Rockford Trade Council, embracing and securing for themselves the markets for the construction industry and allied fields, from Maine to California. The ramifications ensuing from the Court of Appeals' decision, will even render unnecessary the recently sought legislation, permitting picketing of a secondary employer at the primary employer's construction site, inasmuch as an injunction will issue against any of the multi-employers who contract in violation of the terms of the group boycott pact.

By reason of the decision of the Court of Appeals, the group boycott conspiracy existing in Winnebago County, Illinois, has been found to be sanctioned by the "Construction Site Proviso". If, in fact, Congress, through the media of the "Construction Site Proviso", intended to legalize the likes of the combine in Winnebago County, Illinois, *then it has arbitrarily brought into being a monstrous deprivation of personal and property rights, guaranteed by the Fifth Amendment of our Constitution.*

Your Petitioners, solely by reason of independent union affiliation, are denied the right to contract and work, through the legalization of the conspirators' group boycott agreement, within the territory of Winnebago County, Illinois. Congress cannot, consistent with the due process clause, legalize the inherently illegal conspiracy that takes

away a man's right to contract and render services and labor within Winnebago County, Illinois, any more than it could legalize the outright stealing by one group of an individual's property.

Certainly, the specific intent of Congress in enacting the "Construction Site Proviso" may be judicially explored by viewing it alongside of contemporary legislation. Under Title 42 U.S.C.A., Section 1981, entitled "Equal Rights Under The Law", Congress provided that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts. . ."

The first impression decision of the Court of Appeals', interpreting the "Construction Site Proviso", cannot possibly be reconciled with civil rights legislation spelling out the constitutional message of due-process in our day.

In light of Congress' granting employees protection in the selection of their union representation, can the "Construction Site Proviso" be construed so as to harmonize a man's being precluded from contracting, rendering services, and/or working in a political sub-division of a State by reason of his, or his employees' union affiliation, while Congress jealously protects an employee from being so barred, under color of local law, by reason of his race or color?

Under the Fifth Amendment to the Constitution of the United States, no person shall be ". . . deprived of life, liberty, or property without due process of law; . . ." It is beyond question that the right and liberty of every person to engage in a lawful occupation, trade, or calling, is within the framework of this constitutional protection.

Perhaps at a particular construction site, certain affiliated union members need not be required to work along-

side of men belonging to independent unions or with non-union personnel, and accordingly, the "Construction Site Proviso" may be constitutionally justified on this limited basis. However, no organized group of employees, in combination with their employers, in a major industry, may be constitutionally permitted by Congress to tie down a territory as vast as Winnebago County, Illinois, and make their respective competitors' right to contract, work, or render services therein, subject to their terms and conditions.

By guaranteeing employees' freedom to elect their union membership, (Title 29 U.S.C., Section 157), (Pet. for Writ of Cert., 4), and making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of these rights", Congress intended a meaningful enactment of our fundamental concept of fairness.

If Congress legalized group boycotts for the construction industry, aside from treading upon unconstitutional grounds, it made a shamble of the guarantees of freedom it bestowed upon employees. If employees select their own independent union, pursuant with Title 29 U.S.C., Section 157, then a legalized group boycott can preclude them, as well as their employer, who has no choice in the matter at all, from working within a boycotted territory. This is exactly what the conspirators in the case at bar admittedly intend, in order that their joint control over the monopolized area could be maintained.

Senator Taft, in announcing the policy which the "Construction Site Proviso" stemmed, stated at 93 Congressional Record, 4918:

> ". . . Under the Norris-LaGuardia Act, it became impossible to stop a secondary boycott . . . no matter

> how unlawful it may have been at common law. All this provision of the Bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee . . . never succeeded in having anyone tell us the difference between kinds of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts to make them an unfair labor practice."

Congress, in passing Title 29 U.S.C., Section 158(e) of the Labor Management Reporting and Disclosing Act, evidently discovered a good limited secondary boycott. However, when what Congress intended to be legal secondary boycott at a particular construction site, is judicially construed to include a group boycott conspiracy, barring all competing, nonrecognized employers and unaffiliated employees from an area as vast as Winnebago County, Illinois, a fundamental encroachment upon individual rights of liberty and property, protected by the due-process clause, has come into being.

As was stated in *Loewe* v. *Lawler,* 208 U.S. 274, 293-294, (1907):

> "The [Sherman Anti-Trust] Act prohibits any combination whatsoever to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regard, the liberty of a trader to engage in his business. The facts showed a combination that falls within the class of restraints of trade aimed at compelling third parties and strangers, involuntarily, not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt that (quoting from Chief Justice Earle on Trade Unions), 'at common law, every person has individually and the public has

collectively, the right to require that the course of trade should be kept free from unreasonable obstructions.'"

By legally depriving your Petitioners of their right to contract and render services and labor within Winnebago County, Illinois, Congress has arbitrarily taken from them a right of liberty, as well as a right of property, protected by constitutional guarantees.

Clearly, the Fifth Amendment came into being to protect the rights of individuals from arbitrary legislative abuse, such as exists in the case at bar. The very ability of your Petitioners herein to work and survive has been challenged by reason of the power Congress bestowed upon certain organized groups, who can now demand their consideration for allowing one to contract or work within their legally protected territory.

If the interpretation of the Circuit Court of Appeals is correct, which is strenuously denied by your Petitioners, then the "Construction Site Proviso" was intended to arbitrarily grant certain, otherwise illegal combinations in our free society, the control over the very right of nonmembers, to work and market their products, within all areas where group boycott conspiracies prevail. Such an unfettered denial of fundamental individual liberties and property rights, cannot be sanctioned by Congress, consistent with constitutionally vested guarantees.

At the very least, Your Honors should and must grant rehearing herein for the purpose of considering the important issues, of first impression, resolved by the decision of the Circuit Court of Appeals for the Seventh Circuit, that are of vital daily economic consequence upon the functioning of our free enterprise system.

CONCLUSION.

For the reasons set forth above, and heretofore presented in the Petition for a Writ of Certiorari, and on brief filed in reply to briefs of Respondents, it is respectfully urged that rehearing be granted herein and that upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

Earl G. Schneider, a member of the Bar of this Honorable Court hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay, and is restricted to substantial grounds available to Petitioner and not previously presented.

EARL G. SCHNEIDER